Kasim a/l Musa & Ors v Maniam a/l Raman

HIGH COURT (IPOH) — CIVIL SUIT NO 22–28 OF 2001
SU GEOK YIAM JC
20 APRIL 2001

Civil Procedure *— Injunction — Interim injunction — Injunction to restrain defendant from executing consent judgment — Delay in applying to set aside consent judgment — Whether bona fide serious question to be tried — Whether damages would be an adequate remedy for plaintiff and defendant — Where balance of convenience lies*

This was an appeal against the High Court's decision dismissing the plaintiffs' application for an interim injunction to restrain the defendant from executing a consent judgment dated 22 June 2000 which was entered into in respect of Writ Action No 22–136–2000 ('the first action), until the trial of this Writ Action No 22–28–2001 ('the second action'). The issues for determination were: (i) whether there was a bona fide serious question to be tried; (ii) whether damages would be an adequate remedy; and (iii) where the balance of convenience lies.

Held, dismissing the plaintiffs' application for interim injunction with costs:

(1) The court was satisfied at that stage of the proceedings there was a bona fide serious question to be tried which was one of mixed law and fact, that was, whether the first and second plaintiffs, who were non-parties to the first action, and the third plaintiff, who was a party to the first action, had agreed to the terms of the consent judgment before it was recorded by the court. If they had, they were clearly bound by it (see p 709H–I).

(2) Damages would be an adequate remedy for the plaintiffs as the reliefs sought in the second action by the plaintiffs were mainly in monetary terms. The defendant had also given an undertaking to pay damages. Further, there has been neither complaint nor any assertion of doubt by the plaintiffs that the defendant was in no financial position to pay the pecuniary loss as claimed in the second action, if the consent judgment was set aside by the trial judge (see p 711H–I).

(3) The circumstances in which the application was filed showed that there would be more injustice caused to the defendant if the injunction was granted. The plaintiffs took eight months to apply to set aside the consent judgment after the consent judgment was recorded and after execution proceedings had begun. No explanation, let alone a reasonable explanation, had been put forth by the plaintiffs for the delay. Since an injunction is an equitable remedy and equity will only assist the vigilant and not those who sleep on their rights, the conduct of the parties, in

particular the unreasonable delay on the part of the plaintiffs in filing the application was a relevant factor (see p 713C–E).

Obiter dictum:

Assuming the court was wrong for holding that damages were an adequate remedy for the plaintiffs, the court considered the question of whether damages would be an adequate remedy for the defendant. The court was satisfied that damages would not be an adequate remedy for the defendant. The defendant had not only reached the door leading to the fruits of his labour, ie the diligent prosecution of his claim but had already stepped inside the door when the court's process was being invoked by the plaintiffs to chase him out and order him to wait until after the outcome of the second action (see p 712A–B, H–I).

[**Bahasa Malaysia summary**

Ini adalah rayuan terhadap keputusan Mahkamah Tinggi yang menolak permohonan plaintif-plaintiff untuk satu injunksi interim bagi menyekat defendan daripada menyempurnakan satu penghakiman persetujuan bertarikh 22 Jun 2000 yang telah dimasuki berhubung Tindakan Writ No 22–136–2000 ('tindakan pertama'), sehingga perbicaraan Tindakan Writ No 22–28–2001 ini ('tindakan kedua'). Persoalan-persoalan yang perlu ditentukan adalah: (i) sama ada terdapat satu persoalan bone fide yang serius yang perlu dibicarakan; (ii) sama ada ganti rugi adalah satu remedi yang mencukupi; dan (iii) di mana letaknya imbangan kemudahan.

Diputuskan, menolak permohonan plaintif-plaintif untuk injunksi interim dengan kos:

(1) Mahkamah berpuas hati di peringkat prosiding tersebut terdapat satu persoalan bona fide yang serius yang perlu dibicarakan yang mempunyai gabungan undang-undang dan fakta, iaitu, sama ada plaintif-plaintif pertama dan kedua, yang bukan merupakan pihak kepada tindakan pertama, dan plaintif ketiga, yang merupakan satu pihak kepada tindakan pertama, telah bersetuju dengan terma-terma penghakiman persetujuan tersebut sebelum ia telah direkodkan oleh mahkamah. Sekiranya mereka telah bersetuju maka mereka dengan jelas terikat olehnya (lihat ms 709H–I)).

(2) Ganti rugi adalah satu remedi yang mencukupi untuk plaintif-plaintif tersebut kerana relif-relif yang dipohon dalam tindakan kedua oleh plaintif-plaintif adalah dalam bentuk wang. Defendan juga telah memberikan satu akujanji untuk membayar ganti rugi. Tambahan pula, tidak terdapat aduan maupun apa-apa penegasan keraguan oleh plaintif-plaintif bahawa defendan tidak berada dalam kedudukan kewangan untuk membayar kerugian wang sebagaimana yang dituntut dalam tindakan kedua,

sekiranya penghakiman persetujuan tersebut diketepikan oleh hakim perbicaraan (lihat ms 711H–I).

(3) Keadaan-keadaan di mana permohonan tersebut difailkan menunjukkan bahawa akan berlaku lebih ketidakadilan terhadap defendan jika injunksi tersebut dibenarkan. Plaintif-plaintif mengambil masa lapan bulan untuk memohon diketepikan penghakiman persetujuan tersebut selepas penghakiman persetujuan tersebut direkodkan dan selepas pelaksanaan prosiding telah bermula. Tiada penjelasan, apa lagi satu penjelasan yang munasabah, telah dikemukakan oleh plaintif-plaintif kerana kelewatan tersebut. Memandangkan satu injunksi adalah satu remedi ekuiti dan ekuiti akan hanya membantu mereka yang berjaga-jaga dan bukannya mereka yang tidak mengendahkan hak-haknya, kelakuan pihak-pihak, terutamanya kelewatan yang tidak munasabah pada pihak plaintif-plaintif dalam memfailkan permohonan tersebut adalah satu faktor yang relevan (lihat ms 713C–E).

Obiter diktum:

Dengan andaian mahkamah terkhilaf dalam memutuskan bahawa ganti rugi adalah satu remedi yang mencukupi untuk plaintif-plaintif, mahkamah telah mempertimbangkan persoalan sama ada ganti rugi akan menjadi satu remedi yang mencukupi untuk defendan. Mahkamah berpuas hati bahawa ganti rugi tidak akan menjadi satu remedi yang mencukupi untuk defendan. Defendan bukan hanya baru memulakan kes iaitu pendakwaan yang teliti terhadap tuntutan beliau tetapi telahpun tiba kepada satu penyelesaian semasa proses mahkamah digunakan oleh plaintif-plaintif untuk mengusir beliau keluar dan memerintahkan agar beliau menunggu sehingga keputusan tindakan kedua (lihat ms 712A–B, H–I).]

Notes

For cases on injunction, see 2(2) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 2463–3008.

Cases referred to

Allen v Sir Alfred McAlpine & Sons Ltd [1968] 2 QB 229; [1968] 1 All ER 543; [1968] 2 WLR 366 (refd)

Alor Janggus Soon Seng Trading Sdn Bhd & Ors v Sey Hoe Sdn Bhd & Ors [1995] 1 MLJ 241 (refd)

American Cyanamid Co v Ethicon [1975] AC 396 (refd)

CCA Holdings Ltd v Palm Resort Bhd; Loh Ah Sang v Tropicana Golf & Country Resort Sdn Bhd and other actions Civil Suits Nos R1–24–22, R1–24–23, R1–24–24, R1–24–25, R1–24–26, R1–24–27, R1–24 High Court, Kuala Lumpur, 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) para 2014

Chung Khiaw Bank Ltd v Bajaj Textiles Ltd & Anor [1968] 1 MLJ 299 (refd)
Hj Wan Habib Syed Mahmud v Datuk Patinggi Hj Abdul Taib Mahmud & Anor [1986] 2 MLJ 198 (refd)
Kannappa Chettiar v Vellasamy Pillai [1977] 1 MLJ 255 (refd)
Keet Gerald Francis Noel John v Mohd Noor @ Harun bin Abdullah [1995] 1 MLJ 193 (refd)
Khaw Poh Chhuan v Ng Gaik Peng & Ors [1996] 1 MLJ 761 (refd)
Kheng Chwee Lian v Wong Tak Thong [1983] 2 MLJ 320 (refd)
Khor Cheng Wah v Sungai Way Leasing Sdn Bhd [1999] 1 MLJ 223 (refd)
Salisbury v Metropolitan Railway Co (1870) 22 LT 839 (refd)
Siang Yam Beng v Marushin Canneries (M) Sdn Bhd & Anor [1995] 4 MLJ 691 (refd)
Tractors Malaysia Bhd v Tio Chee Hing [1975] 2 MLJ 1 (refd)

Gurbachan Singh (*Bachan & Kartar*) for the plaintiffs.
Sheanna Shanta (*Vidhya Sheanna Low & Partners*) for the defendant.

Su Geok Yiam JC: **.** This is an appeal against my decision dismissing the plaintiffs' application (encl 4) for an interim injunction to restrain the defendant from executing a consent judgment dated 22 June 2000 which was entered into in respect of Writ Action No 22–136–2000, until the trial of this Writ Action No 22–28–2001.

Ms Sheanna, the learned counsel for the defendant, has submitted that the effect of the injunction as prayed for in this application, if granted, is more of an order to stay the execution of the consent judgment ('the consent judgment') in Writ Action No 22–136–2000, which was filed on 1 June 2000 ('the first action') pending the outcome of this Writ Action No 22–28–2001 which was filed on 20 February 2001 ('the second action').

After hearing arguments from both parties, I had dismissed the plaintiffs' application with costs. The plaintiffs have appealed against my decision. I now give my reasons.

The court is in agreement with the submissions of Mr Gurbachan Singh, the plaintiffs' counsel, that the principles to be applied to this case have been laid down in the decided cases, in particular, *American Cyanamid Co v Ethicon* [1975] AC 396 and *Keet Gerald Francis Noel John v Mohd Noor @ Harun bin Abdullah* [1995] 1 MLJ 193. In my view, in the light of these two cases, the questions to be asked by the court when considering whether to grant an interlocutory injunction and the approach to be adopted by the court is as follows:

(a) first, the court has to consider the question whether there is a bona fide serious question to be tried;

(b) if the answer to the question in (a) above is in the affirmative, the court should next ask the question whether damages would be an adequate remedy to the plaintiffs;

(c) if the answer to the question in (b) above is in the affirmative, the court should next consider whether the defendants are in a financial position to pay them. This is because no interlocutory injunction should be granted however strong the plaintiffs' claim may appear to be if damages would be an adequate remedy;

(d) if the answer to the question in (c) above is in the negative, the court has to go further and consider whether the defendant would be sufficiently compensated under the plaintiffs' undertaking as to damages for the loss he would have suffered by being prevented from executing the consent judgment;

(e) if the answer to the question in (d) above is in the affirmative, and the court is satisfied that the plaintiffs are in a financial position to pay them, then the court can proceed to grant the interlocutory injunction to the plaintiffs; and

(f) if the answer to the question in (e) above is in the negative, and the court is in doubt whether damages would be an adequate remedy to the plaintiffs or the defendant or to both the plaintiffs and the defendant, then the court must consider the final question which is where does the balance of convenience lie?;

(g) if the answer to the question in (f) above is that the balance of convenience lies in favour of the grant of the interim injunction then the court should proceed and grant it; and

(h) if the answer to the question in (g) above is in the negative, then the application should be dismissed.

Mr Gurbachan Singh has argued that there is a serious question to be tried since it is trite law that non-parties cannot be bound by an order of court. He has also informed the court that he is unable to find a similar case where a consent order was entered in the absence of non-parties and was binding on them. He has also submitted that the consent judgment is a nullity. In response, Ms Sheanna has submitted that non-parties can be bound by an order of court if they have agreed to be so bound. Nevertheless, she has conceded that there is a serious question to be tried, ie whether the first and second plaintiffs in the second action had given instructions to Mr S Vikneswaran, the counsel for Amran Syarif bin Mat Saain (who is the third plaintiff in the second action, and the third defendant in the first action) that they were agreeable to the terms of the consent judgment although they were not parties in the first action.

In order to appreciate the arguments of both parties, it is important to set out the facts and background of the plaintiffs' application, commencing with the first action followed by the second action, and lastly the plaintiffs' application for the interim injunction to restrain the defendant from executing the consent judgment.

Writ Action No 22–136–2000

In the first action, which was filed on 1 June 2000, the plaintiff, Maniam a/l Raman, (who is the defendant in the second action) had sued four

defendants, namely, Amran Syarif bin Mat Saain and three others, namely, Kader bin Mohd Ali, Abdul Offar bin Musa and Abd Rahman bin Mohamed for breach of an oral agreement of settlement. He had sought the following reliefs:

(a) an interim order to preserve certain cooking equipment and utensils at premises No 76, Jalan Yang Kalsom, Ipoh, Perak, known as 'Restoran Thiwyara';

(b) an interim injunction to restrain the four defendants or their agents, etc, from carrying on business at the said premises; and

(c) an order allowing the plaintiff, Maniam a/l Raman being the tenant of the said premises to enter upon the said premises and to carry on the business until the disposal of the action;

and, alternatively:

(a) special damages of RM200,000;

(b) general damages for loss of income by virtue of being deprived from using the said premises including the utensils and equipment in order to carry on the business; and

(c) any other ancillary order deemed fit by the court.

Together with his writ of summons and statement of claim, the plaintiff also filed a summons in chambers seeking the first three reliefs mentioned above from the four defendants.

In his supporting affidavit, the plaintiff affirmed that the four defendants had experienced financial difficulties and were unable to conduct their restaurant business under the name of Restoran Ehsaniah effectively. They had approached him for financial assistance.

Discussions were carried out between the plaintiff and the four defendants. Sometime in the middle of the month of February 2000, it was agreed between the plaintiff and the four defendants, vide an oral agreement, that in consideration of him giving them financial assistance, they would hand over to him complete control over the conduct and management of the restaurant business, including the day to day running of the business of the restaurant and all financial aspects. Consequently, the plaintiff gave to them loans in the region of RM190,000 to RM200,000.

As it turned out, this arrangement worked well for only two months, ie February and March 2000. Thereafter, they lost interest in assisting him in the running of the business of the restaurant. They also refused to cooperate with him and to provide him with their expertise in the running of the restaurant business.

The four defendants and the plaintiff then entered into a second oral agreement. Under the second oral agreement, the four defendants handed over all their rights and interests in the restaurant business to the plaintiff in consideration of the plaintiff not making any claims against them in respect of the loans which the plaintiff had given to them.

The second oral agreement was subsequently embodied in a letter dated 21 March 2000. It confirmed the handing over of the rights and interests in the restaurant business to the plaintiff, including all the equipment and goods on the said premises.

In order to enable the plaintiff to operate the restaurant business smoothly and efficiently, they had given a notice dated 6 March 2000 to the landlord, ie Syarikat Peladang dan Perusahaan Minyak Sdn Bhd ('the landlord') terminating their tenancy of the said premises. On 21 March 2000, the plaintiff entered into a fresh tenancy agreement with the landlord and he commenced his own restaurant business under the name of 'Restoran Thiwyaa' at the said premises. He paid the rental punctually to the landlord.

Sometime in the course of running his restaurant business, he had temporarily locked up the said premises.

On 4 April 2000, while the premises were still locked, the four defendants, their agents, etc had trespassed onto the said premises by breaking open the locks. They had also replaced the 'Restoran Thiwyaa' signboard with their 'Restoran Ehsaniah' signboard. They then proceeded to carry on the restaurant business under the old name of Restoran Ehsaniah.

As their conduct was contrary to the second oral agreement, the plaintiff lodged a police report on 7 April 2000. On 26 May 2000, the two previous partners of Amran Syarif bin Mat Saain, namely, Kader bin Mohd Ali and Abdul Rahman bin Mohamad had lodged a police report to the effect that they had transferred all their rights and interests in 'Restoran Ehsaniah', including all the existing goods and equipment to the plaintiff. This was followed by a statutory declaration by the third previous partner of Amran Syarif bin Mat Saain, namely, Abdul Offar bin Musa, to the same effect. The director of the landlord also lodged a police report on 6 April 2000 and affirmed an affidavit on 10 May 2000, stating that he had received from the four defendants a notice dated 6 March 2000 terminating the tenancy of the said premises.

All these letters, police reports, notices, affidavit, etc were exhibited in the plaintiff's supporting affidavit. In view of the strong prima facie case presented by the plaintiff, it thus came as no surprise when on 2 June 2000, the High Court Ipoh granted to the defendant the ex parte interim injunction as prayed for. The High Court then fixed the inter parte application for the interim injunction on 9 June 2000. The date for hearing was, subsequently, postponed to 22 June 2000.

On 22 June 2000, when the inter parte application came up for hearing before his Lordship PS Gill J, in the presence of Mr Awtar Singh Gill, learned counsel, and Mr Sugumaran a/l Kumareson, chambering student, for the plaintiff, Maniam a/l Raman and Mr S Vikneswaran, learned counsel for the third defendant, Amran Syarif bin Mat Saain, (who is the third plaintiff in the second action) and Kasim a/l Musa and Abdullah Sani bin Hj Mat Asil (who are non-parties in the first action and who are the first and second plaintiffs in the second action) the consent judgment was recorded.

A One week after the recording of the consent judgment, ie on 30 June 2000, the plaintiff and his counsel went to Restoran Ehsaniah and closed the shop.

About four weeks after the closure of Restoran Ehsaniah, ie on 26 July 2000, the plaintiff, his counsel and the court bailiff went to the shop of
B Kasim a/l Musa, Kafe Sri Mutiara, and commenced execution proceedings against him by locking up his shop.

The following day, ie on 27 July 2000, the plaintiff also commenced attachment proceedings at the house of Kasim a/l Musa's mother, where he resided.

C In my view, in the light of the foregoing the effect of the interim injunction, if granted, is not to stay execution proceedings but to freeze the execution proceedings, since execution proceedings have already commenced.

D *The consent judgment*

In view of the importance of the consent judgment, it is reproduced as follows:

E DALAM MAHKAMAH TINGGI MALAYA DI IPOH

DALAM NEGERI PERAK DARUL RIDZUAN DI MALAYSIA

GUAMAN SIBIL NO 22–136–2000

F ANTARA

MANIAM A/L RAMAN … PLAINTIF

DAN

1 KADER BIN MOHD ALI

G 2 ABDUL OFFAR BIN MUSA

3 AMRAN SYARIFF BIN MAT SAAIN

4 ABDUL RAHMAN BIN MOHAMAD

H (Berniaga atas nama dan gaya

RESTORAN EHSANIAH) … DEFENDAN-DEFENDAN

DIHADAPAN YANG ARIF DATO' PS GILL

I HAKIM, MAHKAMAH TINGGI, IPOH

PADA 22 JUN 2000 DALAM KAMAR

PENGHAKIMAN PERSETUJUAN

TINDAKAN INI setelah dipanggil pada hari ini untuk bicara dihadapan Yang Arif Dato' PS Gill, dalam kehadiran En Awtar Singh Gill dan En Sugumaran a/l Kumareson peguam pelatih iaitu peguamcara bagi plaintif dan En S Vikneswaran, peguamcara bagi defendan ketiga dan Abdullah Sani bin Hj Mat Asil dan Kasim a/l Musa tersebut di atas.

MAKA ADALAH DIHAKIMI SECARA PENGHAKIMAN PERSETUJUAN bahawa Abdullah Sani bin Hj Mat Asil (K/P No 5886219) dan Kasim a/l Musa (K/P No 631012–08–5437) sebagai wakil defendan ketiga selaku pelabur-pelabur dalam Restoran Ehsaniah telah bersetuju untuk membayar plaintif jumlah sebanyak RM137,000 (Ringgit Malaysia Seratus Tiga Puluh Tujuh Ribu sahaja) di mana jumlah sebanyak RM62,000 adalah merupakan wang pelaburan di dalam Restoran Ehsaniah dan jumlah sebanyak RM75,000 adalah merupakan wang yang dipinjamkan oleh plaintif kepada Abdullah Sani Bin Hj Mat Asil ('wang tersebut').

DAN SELANJUTNYA DIHAKIMI bahawa Abdullah Sani bin Hj Mat Asil dan Kasim a/l Musa wakil kepada defendan ketiga hendaklah membayar kepada plaintif wang sebanyak RM137,000 sepenuhnya secara bayaran ansuran sebanyak RM11,416.67 sebulan untuk tempoh 12 bulan dan ansuran pertama harus dibayar pada atau sebelum 10 Julai 2000 dan ansuran selanjutnya dibayar pada setiap 10hb tiap-tiap bulan berikutnya sehingga kepenyelesaian sepenuhnya keatas jumlah tersebut.

DAN ADALAH DIPERSETUJUI bahawa plaintif akan meminta tuanpunya premises untuk menyerahkan sebuah premis di No 76 Jalan Yang Kalsom, 30250 Ipoh, Perak Darul Ridzuan kepada Abdullah Sani bin Hj Mat Asil dan Kasim a/l Musa apabila jumlah wang sabanyak RM137,000 tersebut dijelaskan sepenuhnya kapada plaintif dan plaintif tidak akan membuat apa-apa tuntutan keatas barang-barang yang tardapat di dalam premis-premis tersebut dan Abdullah Sani bin Hj Mat Asil dan Kasim a/l Musa adalah menjadi pemilik sah bagi barang-barang tersebut.

ADALAH JUGA DIHAKIMI SECARA PENGHAKIMAN PERSETUJUAN defendan-defendan bersama Abdullah Sani bin Hj Mat Asil dan Kasim a/l Musa juga bersetuju untuk membayar plaintif jumlah sebanyak RM2,200 (Ringgit Malaysia Dua Ribu Dua Ratus sahaja) pada atau sebelum 3hb tiap-tiap bulan sebagai sewa bagi premis-premis tersebut dan bayaran ini hanya akan tamat setelah defendan-defendan bersama Abdullah Sani bin Hj Mat Asil dan Kasim a/l Musa menjelaskan keseluruhan wang tersebut kepada plaintif. Dan Abdullah Sani bin Hj Mat Asil dan Kasim a/l Musa juga bersetuju membayar plaintif jumlah RM6,600 (Ringgit Malaysia Enam Ribu Enam Ratus sahaja) sebagai bayaran sewa bagi bulan-bulan April, Mei dan Jun iaitu pada atau sebelum 23 Jun 2000.

ADALAH JUGA DIHAKIMI bahawa telah dipersetujui semua bayaran-bayaran yang harus dibayar oleh defendan ketiga, Abdullah Sani bin Hj Mat Asil dan Kasim a/l Musa haruslah dibayar dengan draf bank diatas nama plaintif dan sekiranya gagal membayar mana-mana satu ansuran atau lain-lain bayaran seperti yang tercatit dalam penghakiman ini, defendan ketiga, Abdullah Sani bin Hj Mat Asil dan Kasim a/l Musa dikehendaki membayar keseluruhan jumlah baki wang tersebut dengan serta merta dan juga bersetuju untuk membayar faedah atas kadar 10% atas baki wang tersebut yang tertunggak dan keseluruhan kos-kos yang telah tertanggung dan dibayar oleh plaintif.

ADALAH JUGA dipersetujui bahawa defendan ketiga, Abdullah Sani bin Hj Mat Asil dan Kasim a/l Musa tidak akan mengalihkan atau mengeluarkan barang-barang yang sedia ada dalam Restoran Ehsaniah tersebut.

AKHIRHYA ADALAH DIPERINTAHKAN bahawa dipersetujui sebarang kemungkiran syarat-syarat penghakiman persetujuan ini, plaintif berhak untuk mangambil alih premis-premis tersebut bersama-sama barang-barang dengan serta-merta.

Bertarikh pada 22 Jun 2000.

tt

Timbalan Pendaftar,

Mahkamah Tinggi,

Ipoh, Perak.

Untuk Kelulusan Pihak Tuan,

tt

Tetuan Awtar, Ghazali, Augustine & Co

Untuk Kelulusan Pihak Tuan,

tt

Tetuan Firdaus, Azlina & Co,

(Peguamcara bagi defendan ketiga bersama Abdullah Sani bin Hj Mat Asil & Kasim a/l Musa)

Deraf penghakiman persetujuan ini telah difailkan oleh Tetuan Awtar, Ghazali, Augustine & Co, yang beralamat di No 73A Tingkat 1, Jalan Leong Sin Nam, 30300 Ipoh, Perak. AGA/M/AS/818/2000/zan

It would appear from a reading of the terms of the said consent agreement that:

(a) its main objective was to enable the plaintiff, Maniam a/l Raman, to recover from Kasim a/l Musa and Abdullah Sani bin Hj Mat Asil (ie the two non-parties to the first action) and the four defendants in the first action, a sum of RM137,000 comprising a sum of RM62,000 which had been invested by the plaintiff and a sum of RM75,000 which had been lent to Abdullah Sani bin Hj Mat Asil by the plaintiff, and for them to eventually take over the running of the restaurant business upon the full payment to the plaintiff of the amount of RM137,000 and a further sum of RM6,600 representing the rental of the said premises for the months of April, May and June 2000; and

(b) Kasim a/l Musa, Abdullah Sani bin Hj Mat Asil and Amran Syarif bin Mat Saain (the first, second and third plaintiffs in the second action) would not remove any of the existing equipment from the said premises until the consent judgment had been duly complied with.

Writ Action No 22–28–01

Eight months after the recording of the consent judgment and seven months after attachment proceedings were carried out at Kasim a/l Musa's restaurant, Kafe Sri Mutiara, Kasim a/l Musa, Abdullah Sani bin Hj Mat Asil, Amran Syarif bin Mat Saain and one Shaharuddin bin Fazaldin, the four plaintiffs, commenced this second action against the defendant, Maniam a/l Raman, alleging, inter alia, that:

(a) they never gave any instructions for their names to be included in the consent judgment or to agree to pay the amount as claimed by the defendant in the first action;

(b) the solicitors for Amran Syarif bin Mat Saain did not at any time inform them of any of the terms of the consent judgment and neither were the terms discussed with them or agreed upon by them;

(c) the sum of RM75,000 which was mentioned in the consent judgment bore no connection to the restaurant and the defendant, Maniam a/l Raman, had no cause of action against the first and second plaintiffs in this second action for the said sum;

(d) the defendant, Maniam a/l Raman, only invested a sum of RM50,000 and not RM62,000 as stated in the consent judgment;

(e) as the partners of the restaurant are Kader bin Mohd Ali, Abdul Offar bin Musa, Amran Syarif bin Mat Saain and Abdul Rahman bin Mohamad, the first and second plaintiffs cannot be ordered to make any payment whatsoever;

(f) the consent judgment cannot bind the first and second plaintiffs because both of them were not parties to the first action, whether as plaintiffs or defendants, and they did not receive any monies whatsoever from the defendant, Maniam a/l Raman;

(g) the consent judgment had been entered into without their knowledge or instruction and was contrary to their agreement to postpone the hearing of the first action until a meeting was held for purposes of settlement;

and seeking the following reliefs:

(a) that the consent judgment be set aside;

(b) an injunction be granted to restrain the defendant from executing the consent judgment pending the outcome of this second action;

(c) the defendant be ordered to pay to the first plaintiff a sum of RM55,000, to the second plaintiff a sum of RM65,000 and to the fourth plaintiff a sum of RM55,000;

(d) a declaration that the attachment against the first plaintiff is wrongful and void;

(e) damages suffered by Kasim a/l Musa as a result of the closure of his shop, Kafe Sri Mutiara, together with interest, costs and further or other relief.

The version of Kasim a/l Musa, the first plaintiff, as set out in his statement of claim in the second action, naturally differs from that of Maniam a/l Raman in the first action. According to Kasim a/l Musa, sometime in September 1999, two partners of Restoran Ehsaniah which was operating at the said premises had approached him requesting for financial assistance in order to commence the restaurant business. He and the second plaintiff agreed on condition that his adopted son, Amran Syariff bin Mat Saain, the third plaintiff, was included as a partner. The two partners agreed.

The first and second plaintiffs then invested a sum of RM55,000 and RM65,000 respectively. These two sums of money were, however, insufficient to meet the debts of the business. As both the first and second plaintiffs had no more money to invest in the business, the first plaintiff had approached the defendant, Maniam a/l Raman, and the fourth plaintiff to invest in the business. They agreed and each of them invested a sum of RM50,000. With the RM100,000, the business was able to pay off most of its debts. The previous partners, namely, Kader bin Mohd Ali, Abdul Offar bin Musa and Abdul Rahman bin Mohamad then left the partnership.

The four plaintiffs and the defendant then managed the business. A dispute subsequently arose between the first plaintiff and the defendant concerning business policy. After several negotiations, the first, second and fourth plaintiffs decided to hand over the business to the defendant on the defendant's own proposal that he, the defendant, would repay all monies which had been invested by them, ie a sum of RM55,000, RM65,000 and RM50,000 respectively.

A few days later, the first plaintiff received a phone call from the third and fourth plaintiffs informing him that the defendant had closed down the shop without giving any reason. Upon checking with the defendant, the latter asked the plaintiffs to repay him the sum of RM62,000 which he had invested, and to pay him a monthly sum of RM5,000 as his share of the profits. This was not agreeable to the plaintiffs who then reopened Restoran Ehsaniah after a police report was lodged by the third plaintiff and Kader bin Mohd Ali.

What happened next was that the third plaintiff received a copy of the writ of summons in the first action. On the first date for mention, the first plaintiff attended the Ipoh High Court together with the third plaintiff and the latter's counsel, Mr S Vikneswaran. They met the defendant's counsel, Mr Awtar Singh. The case was postponed to 22 June 2000 for the parties to hold discussions. On 14 June 2000, a meting was held in the office of the third plaintiff's solicitors. Abdul Offar bin Musa and his father did not attend this meeting. It caused the meeting to be postponed to a date to be fixed. All parties agreed to obtain another postponement for the court hearing which was scheduled on 22 June 2000 to enable discussions to be held.

On 22 June 2000, the first and second plaintiffs were in Kuala Lumpur. They received a telephone call from the defendant's counsel informing them that the hearing could not be postponed. The first plaintiff reminded the defendant's counsel that they had agreed for the case to be postponed for discussions towards settlement and that, therefore, the latter should obtain a postponement.

However, upon returning from Kuala Lumpur, the first plaintiff was informed that the consent judgment had been entered into. He was shocked with the terms of the consent judgment.

The application (encl 4)

In this application which was filed on 20 February 2001 together with the second action, the court has to consider the following affidavits:

(a) the supporting affidavit of Kasim a/l Musa affirmed on 16 February 2001 and filed on 20 February 2001 (encl 3);

(b) his further affidavit affirmed on 5 April 2001 and filed on 5 April 2001 (encl 7);

(c) his affidavit in reply affirmed on 18 April 2001 and filed on 18 April 2001 (encl 11);

(d) the supporting affidavit of Amran Syarif bin Mat Saain affirmed on 16 February 2001 and filed on 20 February 2001 (encl 2);

(e) the supporting affidavit of Abdullah Sani bin Hj Mat Asil affirmed on 29 March 2001 and filed on 30 March 2001 (encl 6);

(f) the supporting affidavit of Shaharuddin bin Fazaldin affirmed on 29 March 2001 and filed on 30 March 2001 (encl 5);

(g) the two affidavits in reply of Maniam a/l Raman affirmed on 10 and 20 April 2001 and filed on 10 and 20 April 2001 respectively (encll 10 and 12).

Having done so, the court finds that there is a dispute on facts between the parties on the issue whether the first, second and third plaintiffs have agreed to the terms of the consent judgment. Kasim a/l Musa, the first plaintiff, has also alleged that he received a telephone call on 22 June 2001 from Mr S Vikneswaran whom he has further alleged is the defendant's lawyer. These allegations which initially appear in the plaintiffs' statement of claim in the second action are repeated in paras 19–22 of Kasim a/l Musa's supporting affidavit (encl 4) and para 8 of his affidavit in reply (encl 11).

In response, the defendant, Maniam a/l Raman has alleged that the first, second and third plaintiffs were represented by Messrs Firdaus Azlina, and that all three of them had agreed to the terms of the consent judgment. He has also alleged that Mr S Vikneswaran was the counsel for all the three of them and that it was because of this that Kasim a/l Musa had alleged that while he was in Kuala Lumpur, Mr S Vikneswaran had telephoned him about the refusal of the judge to postpone the hearing on 22 June 2000 and to seek his (Kasim a/l Musa's) instructions. The defendant has also alleged

that the admission by Kasim a/l Musa that he had attended court on 9 June 2001 in order to assist Amran Syarif bin Mat Saain, who is his adopted son, showed that he had in fact authorized Mr S Vikneswaran to record the consent judgment on 22 June 2001. These allegations are found in paras 11 and 12 of his first affidavit in reply (encl 10) and para 3 of his second affidavit in reply (encl 12).

It is pertinent to note that no affidavit has been affirmed and filed by Mr S Vikneswaran to support the allegations of Kasim a/l Musa, including the allegation that Mr S Vikneswaran had no authority to act for the first, second and third plaintiffs when the consent judgment was recorded. If what has been alleged by Kasim a/l Musa is true, he should have had no problem in obtaining an affidavit to that effect from Mr S Vikneswaran in order to support his application for an interim injunction.

Whether there is a bona fide serious question to be tried

The essential elements of the dispute which are relevant to this application to restrain the defendant from executing the consent judgment centre on the question whether Mr S Vikneswaran was acting for Kasim a/l Musa, Abdullah Sani bin Hj Mat Asil and Amran Syarif bin Mat Saain, when the consent judgment was recorded by the court, and whether he was ever authorized to agree to the terms of the consent judgment not only for the third plaintiff for whom he was the counsel on record but also for Kasim a/l Musa and Abdullah Sani bin Hj Mat Asil, who were non-parties to the first action.

In view of this factual dispute, Mr Gurbachan Singh has cited the following excerpt from the judgment of Lord Diplock in the *American Cyanamid*'s case at p 407, paras d–e, to support his proposition that there is a bona fide serious question to be tried which should go for trial, and that an interim injunction should be granted:

> It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavits as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial.

If it were otherwise, his clients would suffer grave injustice should the consent judgment be set aside subsequently, because it would render nugatory the outcome of the second action. He urged the court to grant the injunction to preserve the status quo.

Upon applying the principle as enunciated in the *American Cyanamid*'s case to the facts before me, I am satisfied that at this stage of the proceedings, there is a bona fide serious question to be tried which is one of mixed law and fact, that is, whether the first and second plaintiffs, Kasim a/l Musa and Abdullah Sani bin Hj Mat Asil, who are non-parties to the first action, and the third plaintiff, who was a party to the first action, had agreed to the terms of the consent judgment before it was recorded by the court. If they had, they are clearly bound by it.

With respect to Mr Gurbachan Singh, the court does not agree that it is trite law that non-parties cannot be bound by a court order. The court is of the view that non-parties who are privies can be bound by a consent order recorded by a court. This is because the case which he has cited in support of his submissions, *Kheng Chwee Lian v Wong Tak Thong* [1983] 2 MLJ 320, can be distinguished on the ground that the judgment sought to be set aside was not a consent judgment. In that case, the Federal Court held that it was constrained to agree with the submissions of learned counsel for the interveners that the order of the learned judge was wholly irregular in so far as it purports to affect the registered title, share and interest of the said interveners in the said land when they had not been made parties or given a full opportunity of taking part in the court below.

It is pertinent to point out that immediately before coming to the above conclusion, the Federal Court had made the following observation (at p 323, paras D–G):

> In our judgment, *the court below has no jurisdiction inherent or otherwise, over any person other than those properly brought before it, as parties or as persons treated as if they were parties under statutory provisions* [*Brydes v Brydges & Wood*; *Re Shephard* and *Coleman v Coleman*]. The terms 'judgment' and 'order' in the widest sense may be said to include any decision given by a court on a question or questions at issue between the parties to a proceeding properly before the court [see para 50] of *Halsbury's Laws of England* (4th Ed) Vol 26 at p 237]. And at para 550, the following passages appear:
>
> > '*subject to appeal and to being amended or set aside, a judgment is conclusive as between the parties and their privies and is conclusive evidence against all the world of its existence, date and legal consequences*.' (Emphasis added.)

The word 'privy' has been given, inter alia, the following meaning in *Stroud's Judicial Dictionary of Words and Phrases* (3rd Ed, 1953) Vol 3, at p 2306:

> (1) As distinguished from a PARTY, a privy 'signifies him that is partaker, or hath an interest, in any action or thing' (Cowel); but a person who has a privity of contract is hardly distinguishable from one who is a party to the CONTRACT, for it is a 'personal privity' (*Walker's Case*, 3 Rep 23). See hereon *Bagot Co v Clipper Co* [1901] 1 Ch 196; [1902] 1 Ch 146.

There is also the case of *Tractors Malaysia Bhd v Tio Chee Hing* [1975] 2 MLJ 1 which was decided before the *Kheng Chwee Lian*'s case.

That case which involved the filing by the respondent of a new action to set aside a consent judgment entered in the old action is authority for the proposition that a settlement agreement can bind non-parties to a contract if they have consented to the terms of the settlement agreement which may include agreeing to take over the debt of someone else who is a party to a contract.

The facts briefly are as follows: The respondent and his wife were the sole shareholders of a company, Southern Estate Sdn Bhd. The latter had hired from the appellant 19 tractors in respect of which it was indebted to the appellant for amounts exceeding RM2m. On 21 November 1968, the respondent entered into a written agreement with the appellant whereby in

consideration of the appellant refraining from taking legal proceedings to recover these sums from Southern Estate Sdn Bhd, the respondent undertook and guaranteed, as principal debtor, the payment to the appellant on demand of the total amounts owing by Southern Estate Sdn Bhd. The respondent having defaulted on the written agreement, the appellant sued the respondent in the old action and the respondent's advocate consented to judgment for RM718,266.85 being entered.

In his new action, the respondent alleged that he was not literate in English and that he was induced to sign the agreement by the representation of the appellant's solicitor who drafted the agreement. The Privy Council held that the High Court was correct in dismissing the respondents' application on the ground that it 'is nothing but merely a new twist to overcome [the respondent's] difficulty in raising the loan and to delay the execution of judgment against him.'

Subsequent to the decision of the Privy Council in the *Tractors Malaysia Bhd* case, it was held in *Kannappa Chettiar v Vellasamy Pillai* [1977] 1 MLJ 255 that although an order by consent is not a contract, it is sufficient evidence of the contract upon which it is based, and such contract is not less than a contract and subject to the incidents of a contract because there is now superadded the command of a judge. It, therefore, held that a judgment by consent is binding until set aside, and acts as an estoppel.

In *Siang Yam Beng v Marushin Canneries (M) Sdn Bhd & Anor* [1995] 4 MLJ 691, his Lordship Abdul Malik Ishak J had held that while the general rule is that no person is to be adversely affected by a judgment in an action he was not a party to, there were two exceptions, a privy who is estopped by res judicata and a person whose conduct precludes him from challenging the judgment.

In *Khaw Poh Chhuan v Ng Gaik Peng & Ors* [1996] 1 MLJ 761, the Federal Court had allowed a settlement agreement and a consent order which granted leave to sell a fourth piece of land to be set aside on the ground that the settlement agreement, which formed the basis of the consent order, was not binding on the appellant because he was not a party to it, and it purported to dispose of his interest without his knowledge and consent.

It can be safely inferred from this decision that if the appellant had been a party to the settlement agreement and the consent order, he would have been bound by both the settlement agreement and the consent order.

Whether damages will be an adequate remedy

In my view, damages will be an adequate remedy for the plaintiffs as the reliefs sought in the second action by the plaintiffs are mainly in monetary terms. The defendant has also given an undertaking to pay damages. Further, there has been neither complaint nor any assertion of doubt by the plaintiffs that the defendant is in no financial position to pay the pecuniary loss as claimed in the second action, if the consent judgment is set aside by the trial judge (see *CCA Holdings Ltd v Palm Resort Bhd*; *Loh Ah Sang v*

Tropicana Golf & Country Resort Sdn Bhd and other actions, Civil Suits Nos R1–24–22, R1–24–23, R1–24–24, R1–24–25, R1–24–26, R1–24–27, R1–24 High Court, Kuala Lumpur (Abu Mansor J) 30 April 1992 cited in 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) at para 2014.

Assuming the court is wrong for holding that damages are an adequate remedy for the plaintiffs, the court shall now consider the next question whether damages would be an adequate remedy for the defendant. It is unchallenged based on the evidence before the court that he has diligently prosecuted the first action from the time of filing, on 1 June 2000, to the time of obtaining the ex parte injunction on 2 June 2000 right until the consent judgment was recorded by the court on 22 June 2000. He has also diligently commenced execution proceedings soon after the consent judgment was recorded on 20 June 2000, when he and his counsel closed down Restoran Ehsaniah on 26 July 2000, when he and his counsel and the court bailiff closed down Kafe Sri Mutiara, and on 27 July 2000 when he attached the goods in Kasim a/l Musa's mother's house right until the fixing of the auction date on 23 April 2001 in respect of the execution proceedings already commenced.

On the other hand, the plaintiffs have been dragging their feet despite the initial shock which the first plaintiff, Kasim a/l Musa alleged he felt when he discovered upon his return from Kuala Lumpur that the consent judgment had been entered by the court without his knowledge nor his instructions. First, they filed the second action and the application some eight months after the consent judgment was entered into. Secondly, the hearing of the application was only scheduled for hearing upon the mutual agreement of both the parties at the eleventh hour, ie on 20 April 2001, which was a Friday, at 2.45pm, when the plaintiffs' counsel was fully aware that the next day being the third Saturday of the month was a holiday followed by Sunday, 22 April 2001, a weekend and then Monday, 23 April 2001, which was the day when the auction had already been scheduled. The date of the auction had been brought to the attention of the learned deputy registrar on 16 April 2001 and clearly recorded in the notes of proceedings.

Apart from this, there is also one other very important factor which had weighed heavily on my mind which was the absence of an affidavit from Mr S Vikneswaran to support and fortify the plaintiffs' allegation that the consent judgment had been entered without their authority or instructions. To my mind, this could have been easily obtained from Mr S Vikneswaran since he had signed on the draft consent judgment on behalf of the first, second and third plaintiffs. This is clearly evident from the draft consent judgment that has been reproduced in this judgment.

In view of these factors, the court was satisfied that damages would not be an adequate remedy for the defendant. The defendant has not only reached the door leading to the fruits of his labour, ie the diligent prosecution of his claim, so to speak, but has already stepped inside the door when the court's process is being invoked by the plaintiffs to chase him out and order him to wait until after the outcome of the second action.

Balance of convenience

The court shall now consider the question where the balance of convenience lies.

In *Alor Janggus Soon Seng Trading Sdn Bhd & Ors v Sey Hoe Sdn Bhd & Ors* [1995] 1 MLJ 241, the Supreme Court affirmed the principle that the grant or refusal of an interlocutory injunction must be decided on the fundamental principle that the court should take whichever cause that appears to carry the lower risk of injustice.

The court does not agree with the plaintiffs that the consent judgment is a nullity. On the contrary, the court is satisfied that at this stage of the proceedings, the consent judgment is a valid and regular judgment until and unless it has been set aside.

In my view, the circumstances in which the application was filed shows that there would be more injustice caused to the defendant if the injunction is granted. Here, it has taken the plaintiffs eight months to apply to set aside the consent judgment after the consent judgment was recorded and after the defendant and his counsel had gone to Restoran Ehsaniah to close the shop. No explanation, let alone a reasonable explanation, has been put forth by the plaintiffs for the delay. In fact, about seven months have already passed by since attachment proceedings were carried out at the first plaintiff's restaurant, Kafe Sri Mutiara (on 26 July 2000) and at his mother's house (on 27 July 2000) where he resides.

Since an injunction is an equitable remedy and equity will only assist the vigilant and not those who sleep on their rights, *vigilantibus, non dermientibus, jura subeniunt*, the conduct of the parties, in particular, the unreasonable delay on the part of the plaintiffs in filing this application (encl 4) is a relevant factor (see *Khor Cheng Wah v Sungai Way Leasing Sdn Bhd* [1999] 1 MLJ 223 at p 229). The essence of an application for an interlocutory injunction is that it should be made with promptitude (see *Alor Janggus Soon Seng Trading Sdn Bhd v Sey Hoe Sdn Bhd* at p 262).

An interlocutory injunction will not be granted if the plaintiffs, having sufficient notice of the defendant's intention to commit the act, sought to be restrained, is guilty of unreasonable delay in applying to the court (see *Salisbury v Metropolitan Railway Co* (1870) 22 LT 839, *Chung Khiaw Bank Ltd v Bajaj Textiles Ltd & Anor* [1968] 1 MLJ 299 and *Hj Wan Habib Syed Mahmud v Datuk Patinggi Hj Abdul Taib Mahmud & Anor* [1986] 2 MLJ 198).

In my opinion, after applying the principles which have been laid down in *Allen v Sir Alfred McAlpine & Sons Ltd* [1968] 2 QB 229; [1968] 1 All ER 543; [1968] 2 WLR 366, regarding the issue of delay to the facts of the present case, I find that there has been inordinate delay on the part of the plaintiffs in applying for the interlocutory injunction. I also find that this inordinate delay is inexcusable. Finally, for reasons already set out in the foregoing paragraphs, I find that the defendant is likely to be seriously prejudiced by the delay such that it would make it unjust to grant the injunction claimed.

Before concluding, the court dealt with the issue of maintaining the status quo which was submitted by Mr Gurbachan Singh. Having done so, the court was of the view that the status quo should be maintained. This meant that the execution proceedings should be allowed to run their ordinary course and not be stopped in their tracks by the grant of an interim injunction. In the premises, the court dismissed the plaintiffs' application with costs.

Plaintiffs' application for interim injunction dismissed with costs.

Reported by Moy Saw Han